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86-1257

No. .....

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In The

Supreme Court of the United States

October Term, 1986

JAMES E. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

LELAND E. STEVENSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Were Petitioners deprived of due process of law by their convictions pursuant to 18 U.S.C. Section 2252 for conduct involving undeveloped film when at the time of the conduct neither the facial statutory language nor any judicial construction included undeveloped film within the prohibited transportations.

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JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James E. Smith prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on July 29, 1986 (petition for rehearing and suggestion for rehearing en banc denied October 30, 1986); Petitioner Leland E. Stevenson, Jr., prays that a Writ of Certiorari issue to review the judgment of that court, entered on December 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in *United States of America v. James E. Smith* is reported at 795 F.2d 841 and reprinted as Appendix "A" hereto; the unpublished order denying both rehearing and suggestion for rehearing *en banc* is reprinted as Appendix "B" hereto. The unpublished opinion of that court in *United States of America v. Leland E. Stevenson, Jr.*, is reproduced as Appendix "D" hereto. No District Court opinions were published.[1]

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JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. Section 1254(1).

A joint Petition for Writ of Certiorari is being filed pursuant to Rule 19.4 of this Court because the questions presented are identical and each Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The filing of a joint petition under circumstances materially identical to those present here was ap-

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[1] In Petitioner Smith's case, the United States District Court for the District of Hawaii, Hon. Alfredo C. Marquez Presiding, did not enter a written opinion. In Petitioner Stevenson's case, the United States District Court for the Central District of California, Hon. Pamela Ann Rymer Presiding, entered an extensive written opinion (Appendix "C," *infra*) which has not been published, although the Government moved for publication claiming that the opinion would offer needed "guidance to other courts that may consider the identical issue."

proved in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 598 n.1 (1981).

The opinion of the Court of Appeals in *United States of America v. James E. Smith,* was rendered July 29, 1986, and is reprinted in Appendix "A", herein. A Motion for Rehearing and Suggestion for Rehearing *En Banc* was filed timely. The Court's order of October 30, 1986 denying that Motion and Suggestion is reprinted in Appendix "B" hereto.

In *United States of America v. Leland E. Stevenson,* the opinion of the United States Court of Appeals for the Ninth Circuit was rendered December 10, 1986 and is reprinted as Appendix "D" hereto. The Court of Appeals summarily affirmed Petitioner Stevenson's conviction, citing Petitioner Smith's case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Title 18 U.S.C. Section 2252 in pertinent part provides:

> "§ 2252. Certain activities relating to material involving the sexual exploitation of minors
>
> "(a) Any person who—
>
> "(1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if—

"(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual depiction is of such conduct . . .

"shall be punished as provided in subsection (b) of this section."

Title 18 U.S.C. Section 2255 recently has been amended to include for the first time a definition of "visual depiction," Child Sexual Abuse and Pornography Act of 1986, Pub.L. No. 99-628, 100 Stat. — (1986), which definition is as follows:

§ 2255. Definitions for Chapter

"For purposes of this chapter, the term—

". . .

"(5) 'Visual depiction' includes undeveloped film and videotape."

———o———

STATEMENT OF THE CASE

Detailed facts are set forth in Appendix "A" as to Petitioner Smith and Appendix "C" as to Petitioner Stevenson. However, pertinent to this Petition are only the following undisputed facts:

The Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984), substantially rewrote Chapter 110 of the Federal Criminal Code. 18 U.S.C. §§ 2251-55 (West Supp. 1984). That amendment resulted in a statutory scheme prohibiting a variety of activities involving the mailing or interstate transportation of any "visual de-

piction" of a person less than eighteen years of age engaging in sexual conduct. The "visual depiction" terminology appeared for the first time in the 1984 Amendment; proscriptions in prior law had prohibited "any visual or print medium [as those terms were defined in the statute] . . ." involving "the use of a minor engaging in sexually explicit conduct."[2] The statutory scheme resulting from the legislation provided no definition of "visual depiction."

Petitioner Smith's indictment charged that, subsequent to the effective date of the Child Protection Act of 1984, he on three occasions mailed undeveloped film from Hawaii to Maryland. Upon those allegations, he was convicted of three counts of violating 18 U.S.C. § 2252(a) (West Supp. 1984) (shipping in interstate commerce a "visual depiction" involving the use of a person under eighteen years of age engaging in sexually explicit conduct). Petitioner Stevenson's indictment charged that, during 1985, he transported undeveloped film from Nevada to California. On that allegation, Stevenson also was convicted of that offense. Neither Petitioner's conduct was for gain or profit. Petitioners are presently serving resulting 10-year and 5-year sentences, respectively.

Each of those convictions was obtained in the face of the argument that undeveloped film was not a "visual depiction." The Due Process issue of whether a judicial

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[2] The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 7-9 (1978). The 1984 amendment, along with substantially rewriting the language of the entire chapter, raised the applicable age from 16 to 18 years, eliminated both the element of intent to sell or distribute for sale and deleted the obscenity element from Section 2252.

enlargement of the definition of "visual depiction" (to include undeveloped film) could be applied retrospectively was resolved against each petitioner.[3]

During the course of Petitioners' appeals, legislation was proposed to amend Section 2255 to include videotape and undeveloped film in the definition of "visual depiction." After receiving uncontradicted testimony from officials of the Postal Inspection Service that the existing definition included neither,[4] and after considering the Report of the Attorney General's Commission on Pornography which had reached the same conclusion,[5] Congress enacted the proposal in late 1986.[6]

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[3] In Smith's case, after affirming the District Court's novel expansion of "visual depiction" to include undeveloped film, the Court of Appeals noted, "[A]lthough Smith did not specifically raise the issue of due process, we feel that our conclusion [expanding the "visual depiction" definition] compels us to address the issue." 795 F.2d at 847 n.4. Petitioner Stevenson, however, squarely raised the due process issue as the focus of a pretrial motion to dismiss.

[4] Footnote 11, *infra*.

[5] Footnote 11, *infra*.

[6] Child Sexual Abuse and Pornography Act of 1986, Pub. L. 99-628, 100 Stat. — (1986).

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S RETROSPECTIVE APPLICATION OF IT'S EXPANSION OF THE DEFINITION OF "VISUAL DEPICTION" TO INCLUDE UNDEVELOPED FILM VIOLATES THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW

A. The Definition of Visual Depiction Did Not Include Undeveloped Film Prior to the Decision of the Ninth Circuit in Petitioner Smith's Case.

The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 7-9 (1978), represented the first enactment of the Federal Criminal Code chapter involved in these cases. That enactment in pertinent part prohibited transportation in interstate or foreign commerce or mailing of any obscene "visual or print medium" involving the use of a minor engaging in sexually explicit conduct. The act specifically states, " 'visual or print medium' means any film, photograph, *negative,* slide, book, magazine, or other visual or print medium [emphasis added]."

Thus, while the originally enacted statute evidenced Congressional intent to include film and photographic negatives, it did *not* include *undeveloped* film.[7] Congress undoubtedly was aware that film and photographic negatives

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[7] Insofar as Petitioners' counsel are aware, no judicial decision ever has addressed the issue of whether "visual or print medium" in the original enactment of Section 2252 included undeveloped film. However, the inclusion of the word "negative" in the definition of "visual or print medium" evidences, consistent with well-established rules of statutory construction, Congressional intent to specifically exclude exposed but undeveloped film. The maxim "expressio unius est exclusio alterius" dictates that, where things to which a statute refers are

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contain a visible image discernible to the eye. In contrast, exposed but undeveloped film contains no such image.

The Child Protection Act of 1984, Pub. L. 98-292, 98 Stat. 204-06 (1984), rewrote Section 2252 so that it became an outright ban on mailing or interstate transportation of any "visual depiction" of a minor (less than eighteen years of age) engaging in sexual activity, regardless of obscenity and regardless of any intent to sell or distribute for sale. The Act did not define "visual depiction." Accordingly, interpretation was left to the "ordinary, contemporary, common meaning" of the term. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The word "visual" invariably is defined in terms of a person's ability to see. Thus, WEBSTER'S THIRD

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designated, there is an inference that all omissions should be understood as exclusions. 1A N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 194-203 (Sands 4th ed. 1984); *e.g., Complaint of McLinn*, 744 F.2d 677, 683 (9th Cir. 1984). Undeveloped film was not included in the statutorily designated types of "visual or print medi[a]" and accordingly must be excluded. It is significant that Congress *defined* "visual or print medium," rather than using the term "includes."

Congress' distinction is a logical one. Obviously, exposed film exists in only three states: Undeveloped, developed negative images and developed positive images. Positive and negative prints contain an image visible to the eye; exposed but undeveloped film contains merely a potential image. Indeed, before the film is developed no one can possibly know what result will be realized. The photographer may have over- or under-exposed the film; the processor of the film may err and thus fail to produce a visual depiction, particularly with color film which virtually always must be processed commercially. Finally, the possessor of film may never cause the exposed film to be developed.

NEW INTERNATIONAL DICTIONARY (unabridged, 1981) gives the following definitions of "visual:"

1. "Of, relating to, or used in vision: serving as the instrument of seeing;"
2. "Attained or maintained by sight;"
3. "Optical;"
4. "Capable of being seen: visible;"
5. "Producing mental images: vivid;"
6. "Done or executed with the aid of direct sight and without assistance (as from instruments or radar)."

The same source defines a "depiction" as a "representation, delineation, portrayal [or] description."

There can be no question that the ordinary words "visual depiction" mean, at a minimum, something which presently is visible to the eye. It neither is a legal term of art nor does it have any specialized meaning within the motion picture or photography industries. The term simply consists of ordinary words which must be accorded their ordinary and common meaning. This is particularly true in the case of a criminal statute,[8] and even more so where, as here, the statute reaches non-commercial activities.[9]

Although Congress failed to include a definition of "visual depiction," the reason is obvious: it is so clear

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[8] *Dowling v. United States*, — U.S. —, 105 S.Ct. 3127 (1985) (rule of lenity must be applied to criminal statutes).

[9] *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (less strict vagueness test for economic regulations and for statutes with only civil consequences).

that no definition is necessary. Positive and negative prints of film and photographs contain a "visual depiction" of something; exposed but undeveloped film does not.

There are very good reasons why neither the 1977 Congress nor the 1984 Congress intended these exceedingly harsh statutes to apply to exposed but undeveloped film. Because of its lack of any visible image, a person transporting such undeveloped film may have no knowledge whatsoever of its potential post-development contents. Congress quite properly determined that expanding the Act's coverage to undeveloped film which contains no visual image whatsoever carries too great a potential for ensnaring the innocent, particularly in view of the limited scienter requirement in Section 2252.[10]

In the face of the plain meaning of "visual depiction," however, two things have occurred. First, the Ninth Circuit in Petitioner Smith's case concluded that the exclusion of undeveloped film from "visual depiction" had turned out to be a "loophole . . . inconsistent with congressional intent." Accordingly, the Court enlarged the plain meaning of "visual depiction" to include undeveloped film. 795 F.2d at 846-47. Second, in response to the urging of

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[10] *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985) ("Congress specifically omitted a *mens rea* requirement for conviction in order to establish a *per se* rule making it illegal for persons to knowingly transport, . . . in interstate or foreign commerce . . . the prohibited materials. . . ."). *See also United States v. Reedy*, 632 F. Supp. 1415, 1423 (W.D. Okla. 1987) (Knowledge of the victim's age is not a necessary element of prosecution under Section 2251).

both the Department of Justice and the Postal Inspection Service,[11] Congress amended the relevant statutes to in-

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[11] The suggestion appeared in the United States Department of Justice, Attorney General's Commission on Pornography, Final Report, pp. 637-638 (Government Printing Office, 1986). That report, first made public long after both of the Petitioners had been convicted, included the following as Recommendation 41: "Congress should amend 18 U.S.C. § 2255 to define the term 'visual depiction' and include undeveloped film in that definition." According to the Report, one of the factors motivating the Committee ot consider the issue was a letter from an Assistant United States Attorney who had encountered difficulties in prosecuting cases involving interstate or postal shipment of only undeveloped film.

The recommendation in the Attorney General's Report presumably was at least a partial cause of the proposal culminating in the amendment of Section 2255 defining "visual depiction" to include videotape and undeveloped film. At the committee hearing, the following colloquy occurred:

> "Mr. HUGHES [Member of Congress]. . . .
> "I gather that there is a problem with regard to visual depictions regarding videotape and what is it—unfinished, undeveloped film.
>
> "Mr. BISHOP [Steven D. Bishop, Manager, Fraud and Prohibited Mailings Branch, United States Inspection Service]. Yes.
>
> "Mr. HUGHES. Have we had some problems in specific cases where it has been argued that there is no visual depiction if it is not completed? Is that the problem? Is it a proof problem?
>
> "Mr. BISHOP. I think Mr. Mahalko is familiar with one case, at least, out in California where that became a problem, sir.
>
> "Mr. MIHALKO [Daniel Mihalko, Postal Inspector, United States Postal Inspection Service]. That was a case brought to our attention while on the Attorney General's Commission on Pornography in which a count whereby undeveloped film of a pedophile was sent to an undercover officer or postal inspector and that count could not be used, because it did not fall under the definition of a visual depiction.

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"I think one of the things we are trying to get across is we need a definition of visual depiction as we had in the 1978 statute.

"Mr. HUGHES. I see."

Testimony before the House Judiciary Committee, August 14, 1986.

The written submission to the Committee from the United States Postal Inspection Service, which was echoed in oral testimony and substantially adopted in the Committee findings, was as follows:

"We would also like to recommend that a portion of the Child Protection Act, Title 18 U.S.C. 2255 be amended to define the term 'visual depiction' and that video tape and undeveloped films be included in that definition.

"The Child Protection Act prohibits the mailing of certain sexually explicit visual depictions. The predecessor to the present act specifically defined the term 'visual depictions.' [That statement is incorrect for two reasons: first, the 1978 legislation, as hereinbefore indicated, only defined "visual or print medium;" second, the definition did not include undeveloped film.] However, the current statute creates a dilemma for law enforcement agents and prosecutors in the case of undeveloped film. If the indictment is brought while film is yet to be developed the depictions contained on the undeveloped film are not subject to prosecution. If the film is allowed to remain in the hands of the offender until developed, it is virtually impossible to prevent the pictures from entering circulation which is the very harm sought to be eliminated. In an effort to curb the continued exploitation of children, it is necessary to define the term 'visual depictions' to include images contained on rolls of undeveloped film and video tape. This change will afford United States attorneys the opportunity to bring an indictment under the Child Protection Act for offenses depisted on video tape and undeveloped film while under the control of an offender.

"This recommendation was made by the U.S. Attorney General's Commission on Pornography."

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clude undeveloped film in the definition of "visual depiction." Pub. L. 99-628, 100 Stat. —, *supra* note 6. Accordingly, "visual depiction" did not include undeveloped film until the courts, and later the Congress, decided that it should. However, neither of those events occurred until long after the allegedly illegal conduct of petitioners.

B. Retrospectively Defining "Visual Depiction" To Include Undeveloped Film Violated Petitioner's Due Process Right To Fair Notice of The Statute's Prohibitions.

No component of due process is more fundamental than the right of persons to be forewarned of what conduct on their part will subject them to criminal prosecution. In Petitioner Smith's case, the Court of Appeals generally recognized that principle:

> "As a matter of due process, '[n]o one may be required at peril of life, liberty or property to speculate

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Testimony of Steven D. Bishop of the United States Postol Inspection Service, August 14, 1986, before the House Judiciary Subcommittee on Crime. See also 100 Stat. —.

Against that background, it is significant that the legislative history of the 1986 amendment seemingly goes to great lengths to urge that Congress in the first place intended, despite clear language to the contrary, to include undeveloped film in the term "visual depiction." 100 Stat. —.

The Committee report states, "[t]he [House Judiciary Committee] approves of the holding of the U.S. Court of Appeals for the Ninth Circuit in rejecting the argument that the term 'visual depiction' does not include undeveloped film (*U.S. v. James E. Smith*, 795 F.2d 841, 846-7 (9th Cir. July 29, 1986))." 100 Stat. —. The foregoing legislative history is remarkable to the extent that one Congress was so zealous in attempting to express the legislative intent of a previous one where that intent is wholly irrelevant to the statute being passed. However, the foregoing after-the-fact legislative history cannot be a substitute for giving fair notice in the first place.

> as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L.Ed. 888 (1939), quoted in *Hynes v. Mayor of Oradell,* 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). A statute must fail for vagueness if persons 'of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), quoted in *Hynes,* 425 U.S. at 620, 96 S.Ct. at 1760. We must therefore consider whether a statute forbidding the mailing of 'visual depictions' of sexually explicit conduct by minors gave Smith fair notice that the mailing of undeveloped film of such activities was thereby prohibited." 795 F.2d at 847 n.4.

In its analysis, however, the Court did not consider several significant controlling decisions of this Court which command a contrary result. The most recent is this Court's decision in *Kolender v. Lawson,* 461 U.S. 352 (1983), which held unconstitutionally vague a California statute requiring persons who loiter or wander on the streets to provide a "credible" and reliable identification" when requested by a police officer. The void-for-vagueness doctrine is a vital part of the due process of law and requires:

> "[T]hat a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." 461 U.S. at 357.

The opinion for the Court in *Kolender* emphasized that even the "weighty concern" for strengthening law enforcement:

> "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

. . .

> Although due process does not require 'impossible standards' of clarity, . . . this is not a case where further precision in the statutory language is either impossible or impractical." 461 U.S. at 361 (citations omitted).

Similarly, this is not a case in which it would have been impossible, impractical or even particularly difficult for Congress to have written a statute covering undeveloped film, if that had been its intention. Indeed, Congress now has done so. However, Congress originally chose not to define "visual depiction," thus leaving the statute with precise and narrow language which, to the average person, certainly excluded matter containing no image visible to the eye. As the legislation stood at the time of Petitioners' conduct, it simply provided no fair warning to ordinary citizens that a "visual depiction" included more than the words themselves normally mean.

Irrefutable evidence that persons "of common intelligence" would conclude that the undefined term "visual depiction" did not include undeveloped film exists in the form of uncontradicted congressional testimony of officials from the Postal Inspection Service. That testimony, which was before the House Judiciary Subcommittee on Crime (reproduced in footnote 11 herein), concurs with the apparently unanimous conclusion of the Attorney General's Commission on Pornography that the term "visual depiction" in the Child Protection Act of 1984 (under which Petitioners were prosecuted) did *not* include undeveloped film and that, accordingly, remedial legislation was needed. Even the prosecutors in Petitioner Stevenson's case, by their Motion for Publication of the District Court's opinion

(footnote 1, *supra*), effectively acknowledged the novelty and significance of the enlargement of Section 2252. It is unacceptably offensive to due process that the citizenry is expected to know that a criminal statute proscribes otherwise legal conduct where the statute's inapplicability is so obvious as to result in consistent expert testimony to that effect.

A much different situation is presented where broad statutory language is construed on a case-by-case basis to apply to particular facts and circumstances. Thus, the federal statute proscribing the mailing of obscene matter, 18 U.S.C. § 1461 (West 1984) was construed to apply to the mailing of undeveloped film to a *commercial* processor. *Spillman v. United States*, 413 F.2d 527 (9th Cir. 1969). The relevant Section 1461 language, however, provided, "[e]very obscene article, matter, thing, device or substance . . . is declared to be nonmailable matter."

The all-inclusive language, "every article, matter, thing, device or substance," is a far cry from the narrow and precise term, "visual depiction."[12] The latter simply affords no notice to ordinary citizens that undeveloped film which contains ~~no~~ visible image is nonetheless a "visual depiction."

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12 *Spillman relied upon United States v. Peller*, 170 F.2d 1006 (2nd Cir. 1948), a 1948 decision of the Second Circuit holding undeveloped film to be within the meaning of Section 1461 which, as it then read, applied to "every obscene . . . or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character." In the more than 100-year history of the federal criminal obscenity statutes (18 U.S.C. §§ 1461-65 (West 1984)), these two decisions are the only ones ever applying much broader language of the federal obscenity statutes to undeveloped film.

The situation here is similar to that in *Bouie v. City of Columbia,* 378 U.S. 347 (1964). There, this Court held that due process was violated by the trespass convictions of defendants under a statute whose terms define the prohibited conduct as the entry upon the lands of another after notice not to enter. After defendants were convicted, the South Carolina Supreme Court construed the statute in the defendants' case to cover not only the act of entry on the premises of another after notice not to enter, but also the defendants' conduct of *remaining* on the premises after being asked to leave.

In short, defendants' conduct appeared to ordinary citizens to be outside the narrow terms of the statute until the statute was enlarged during the pendency of defendants' own appeal. This Court held that such judicial expansion of narrow statutory language was tantamount to *ex post facto* legislation and deprived defendants of the fair notice guaranteed by the Due Process Clause:

> "When a statute on its face is narrow and precise, however, it lulls the potential Defendant into a false sense of security giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." 378 U.S. at 352.

In this case, as in *Bouie,* only the Ninth Circuit's retroactive act of judicial construction, tantamount to an *ex post facto* law, rendered undeveloped film a "visual depiction" within the meaning of the Act. That judicial construction deprived Petitioners of the fair notice component of the Due Process Clause.

In *Rabe v. Washington,* 405 U.S. 314 (1972), this Court struck down the retroactive application of a judicial en-

largement of the State of Washington's obscenity statute. The Washington state court had held that, while the subject motion picture was not obscene generally, it was obscene in the *context* in which the accused had exhibited it (a drive-in theater). This Court reversed:

> "We need not decide the broad constitutional questions tendered to us by the parties. We hold simply that a State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the *location* of the exhibition was a vital element of the offense." 405 U.S. at 316 (emphasis added).

In *Marks v. United States,* 430 U.S. 188 (1977), this Court applied the due process requirement of fair notice to 18 U.S.C. Section 1465 (West 1984) (prohibiting interstate transportation of obscene material), a statute with broad language which had been narrowed considerably by *Roth v. United States,* 354 U.S. 476 (1957) and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). In 1973, this Court relaxed the *Roth-Memoirs* restrictions in *Miller v. California,* 413 U.S. 15 (1973). The issue in *Marks* was whether the *Miller*-based expansion of the statutory coverage could be retroactively applied. This Court squarely held that, despite the "sweeping" statutory language in Section 1465, the *Miller* definition could be applied only prospectively. The effect of *Miller* was held to be "the same as the new construction in *Bouie.*" 430 U.S. 195. Retroactive application accordingly denied the due process right to fair notice.

In disposing of the Due Process issue in Petitioner Smith's case, the Ninth Circuit's focus was upon the fact

that his interstate transportation of undeveloped film was part and parcel both of interstate transportation of developed film (violating Section 2252) and of using minors in the original photography (violating Section 2251):

> "We conclude that fair notice was given. The statute clearly forbids the condition precedent of the undeveloped film, the actual inducement of minors into the sexually explicit conduct to be photographed. See 18 U.S.C. § 2251. The statute likewise prohibits the mailing of negatives and prints, the logical consequence of mailing undeveloped film to a processor. See 18 U.S.C. § 2252. In light of this, we conclude that no person of common intelligence would need to guess that the intermediate step, the actual mailing of the undeveloped film, was also prohibited. No one fully reading the statute could reasonably conclude that the statute permitted Smith's acts." 795 F.2d at 847 n.4.

The Ninth Circuit's disposition of the issue is inappropriate in two respects: First, the described circumstances do not necessarily apply to a violation of Section 2252. For example, in Petitioner Stevenson's case, there was no evidence that he had any intent to leave California with the film once it was developed.[13] Also, it is obvious that a person only transporting undeveloped film could have been totally uninvolved in the original photography.

Second, Petitioners' argument does not depend upon what they subjectively may or may not have known. Rath-

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[13] California law does not prohibit dissemination of this type of material unless it is obscene (not required for violation of Section 2252), CAL. PENAL CODE ANN. § 311.10 (West Supp. 1986) or it involves minors less than 17 years of age (as opposed to 18 years of age under Section 2252). CAL. PENAL CODE ANN. § 311.4 (West Supp. 1986). *See also* CAL. PENAL CODE ANN. § 311.3 (West Supp. 1986) (prohibiting developing of film depicting sexual conduct by a person under 14 years of age).

er, the argument is that the statutory words "visual depiction" do not warn potential violators of ordinary intelligence that undeveloped film containing no visible image is nevertheless a "visual depiction." In fact, the challenged legislative scheme practically labels undeveloped film as being beyond its scope. As construed, the statute functions as a classic trap for the unwary.

The constitutional issue of fair notice must be measured by a strict standard in this case. As earlier noted, Petitioners were convicted of violating statutes which require no commercial purpose or intent to commit any act which is unlawful and which impose particularly harsh criminal penalties. These factors compel a stricter standard of judicial review.

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), this Court upheld an ordinance regulating the sale of drug paraphernalia against a vagueness challenge, stating:

> "The degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with

respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 498-99.

In the present case, the statute is not an economic regulation, and applies to ordinary citizens (such as Petitioners) engaged in purely private, non-commercial conduct. As Petitioners' cases demonstrate, the statute allows imprisonment for ten years without any intent to violate the law[14] as a consequence of failure to anticipate that

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[14] Section 2252 has been construed to apply to situations involving no sexual activity whatsoever. *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (visual depiction of a minor engaged in "actual or simulated . . . lascivious exhibition of the genitals or pubic area" includes nude photograph coupled with an apparent "suggestion of a willingness to engage in sexual activity."). In any event, sexual activity between an adult and a minor either sixteen or seventeen years of age is not necessarily illegal or immoral, either in the United States or in foreign countries. For example, the age of consent is sixteen years or younger in Alaska, ALASKA STAT. §§ 11.41.434, 11.41.436 and 11.41.438 (Michie 1983), Arkansas, ARK. STAT. ANN. § 41-1806 (Bobbs-Merrill 1977), Connecticut, CONN. GEN. STAT. ANN. § 53.21 (West 1985), Illinois, ILL. ANN. STAT. §§ 12-14, 12-15 and 12-16 (Smith-Hurd 1986), Iowa, IOWA CODE ANN. § 709.4 (West 1979), Maine, ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 1986), New Hampshire, N.H. REV. STAT. ANN. § 632-A:3 (Equity 1986), New Jersey, N.J. STAT. ANN. § 2C:24-4 (West Supp. 1986), and Vermont, VT. STAT. ANN. tit. 13, § 2821 (Equity Supp. 1986), § 1301 (1974); the general age of consent is seventeen years or less in Texas, TEX. PENAL CODE ANN. § 21.11 (Vernon 1974), § 22.011 (Vernon Supp. 1986). Foreign jurisdictions obviously present a wide variance of laws on this subject, depending upon the mores of the country. For example, the age of marriageability is as young as thirteen years in modern American jurisdictions. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1, 12 (1983). Historically, English statutory prohibitions against consensual sexual relations with young female established an age of consent as low as ten years, *see* Note, *Unlawful Sexual Intercourse: Old Notions and a Suggested Reform*, 12 PAC. L.J. 217, 223 (1981), and the general age of consent remains sixteen years or younger in Commonwealth jurisdictions. *See, Scutt, The Standard of Consent in Rape*, 2 NEW ZEALAND L.R. 462, 465 (1976).

"visual depiction" would be expanded to encompass undeveloped film. The constitutional requirement of due process absolutely compels that adequate forewarning be given to the world at large of what conduct will subject a person to a criminal statute with such minimal scienter but harsh consequences.

The fact that the federal statute proscribing the mailing of obscene matter was construed in one 1948 and one 1969 decision to include undeveloped film has little relevance to the present case. At no time have the federal obscenity statutes used such narrow and precise language as "visual depiction" to refer to the proscribed matter.

Petitioners challenge neither the wisdom nor the power of Congress to enact legislation proscribing interstate transportation of undeveloped film depicting persons less than eighteen years of age involved in sexual activities; nor do Petitioners challenge the questionable holding of the Court of Appeals that, although the 1984 Congress used plain language indicating otherwise, it nonetheless intended to include undeveloped film in the coverage of Section 2252. Petitioners complain only that neither Congress nor the courts gave fair warning that Section 2252 would proscribe otherwise legal activities involving transportation of undeveloped film. Although fair warning now has been given, Petitioners' convictions for pre-warning conduct—two years prior to the warning—cannot stand.

The subject matter of Petitioner's convictions is generally repugnant to American society; those who are shown to be involved with it receive near universal opprobrium. Yet legislation arguably proscribing Petitioners' conduct is less than three years old. In its zeal to

stamp out this conduct, the federal criminal justice system has turned its back on distinctive and critical principles which have long illuminated this country amongst the nations of the world. It is respectfully submitted that our country requires the reaffirmation of cherished due process precepts which a reversal of Petitioners' convictions would signal far more than it would benefit from their being affirmed.

—o—

CONCLUSION

Petitioners pray that a Writ of Certiorari be granted in each case and that the judgments of the United States Court of Appeals for the Ninth Circuit sustaining their convictions for interstate transportation of undeveloped film be reversed.

DATED: January 2, 1987

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA v. JAMES E. SMITH

UNITED STATES of America,

Plaintiff-Appellee,

v.

James E. SMITH, Defendant-Appellant.

No. 85-1216.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1986.

Decided July 29, 1986.

OPINION

Before CHOY, ALARCON, and WIGGINS, Circuit Judges.

WIGGINS, Circuit Judge:

Appellant James E. Smith (Smith) appeals from a judgment entered on a jury verdict finding him guilty of six counts of violating the federal child pornography statutes, 18 U.S.C. §§ 2251, 2252 (1984 Supp.),[1] and one count of being a felon in possession of a firearm in violation of 18 U.S.C.App. § 1202(a)(1982). We affirm.

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1. These sections are part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, as amended by the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204.

FACTS

In 1984, Smith took photographs of three teenage girls in various stages of nudity, for the purpose, he asserts, of starting a catalog of lingerie and beauty products for teenage girls. Smith claims the photographs were not to be shown to anyone but himself and the girls themselves, and the government introduced no evidence at trial to contradict this assertion.

Smith mailed the undeveloped, unprocessed film to a photo company in Maryland through a standard "film mailer." The company services only private (as opposed to commercial) photographers. After developing the film, the company contacted U.S. postal inspectors. The postal inspectors examined the photographs, consulted a pediatrician, interviewed Smith and two of the children in the photographs, and then filed an affidavit for a warrant to search Smith's residence. A magistrate issued the warrant, and the ensuing search uncovered, among other things, a .357 Magnum revolver in a suitcase in a rear hall closet.

Smith was charged with three counts of inducing or coercing a minor to engage in sexually explicit conduct (specifically sadistic and masochistic abuse) for the purpose of producing visual depictions of such conduct (18 U.S.C. § 2251(a) (1984 Supp.)), three counts of mailing such visual depictions (18 U.S.C. § 2252(a) (1984 Supp.)), and one count of being a felon in possession of a firearm (18 U.S.C.App. § 1202(a) (1982)). A jury convicted Smith on all counts. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. The Child Pornography Counts

A. "Distribution" Requirement

Smith contends that there was insufficient evidence to allow a reasonable jury to conclude that he intended to distribute the pictures to others, rather than merely use them himself. The government does not dispute this, but argues that proof of intent to distribute is unnecessary under sections 2251 and 2252.[2] Therefore, although Smith frames his argument in terms of sufficiency of evidence, the real issue turns on interpretation of the statutes, which is a question of law reviewable *de novo*. *See United States v. Wilson*, 720 F.2d 608, 609 n. 2 (9th Cir.1983), *cert. denied*, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984).

The language of sections 2251 and 2252 is clear and unambiguous. The plain language of the sections simply

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2. The statutes provide in relevant part:

§ 2251

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided in subsection (c), if such person knows or has reason to know that such visual depiction will be . . . mailed, or if such visual depiction has actually been . . . mailed.

§ 2252

(a) Any person who—

(1) knowingly . . . mails any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . . shall be punished as provided in subsection (b) of this section.

makes illegal the inducement of children into sexual conduct for the purpose of creating visual depictions of that conduct (section 2251) and the mailing of such visual depictions (section 2252). Neither section requires that the defendant's ultimate goal be distribution of the visual depiction.

Earlier versions of sections 2251 and 2252 both required that the prohibited visual depictions be "for the purpose of sale or distribution for sale," *see* 18 U.S.C. §§ 2251, 2252 (1982) (amended), but the 1984 amendments eliminated that language, as Smith concedes. Smith nevertheless argues that the 1984 amendments were intended only to close a potential loophole for distributors who exchanged, lent, or gave away material, rather than selling it. It was not intended, Smith argues, to eliminate the distinction between distributors and mere producers for personal use. He urges us to consider a number of passages in the legislative history that strongly suggest the amendment was designed to allow prosecution of ***non-commercial*** distributors.

Although we are not absolutely forbidden to look at the legislative history in construing a statute that is plain on its face, *see Tulalip Tribes of Washington v. F.E.R.C.*, 732 F.2d 1451, 1454 (9th Cir.1984), we must take such a step cautiously. *Rivera v. Becerra*, 714 F.2d 887, 893 (9th Cir.1983), *cert. denied*, 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 124 (1984). As we have noted on more than one occasion,

> [I]f evidence drawn from the face of the statute militates strongly for one interpretation, but not quite so strongly that the legislative history may safely be ignored, the legislative history should be considered,

> but considered cautiously. Under these circumstances a second interpretation should be accepted on the basis of the legislative history only if the evidence is very strong, which will usually require explicit language.

Heppner v. Alyeksa Pipeline Service Co., 665 F.2d 868, 873 (9th Cir.1981); *Tulalip Tribes*, 732 F.2d at 1454 (quoting *Heppner*).

The legislative history in the present case does not outweigh the plain language of the statute. Although the committee reports and the floor debate strongly suggests that Congress deleted the language "for the purpose of sale or distribution for sale" to eliminate the existing loophole for the nonprofit distributor, *see e.g.*, H. Rep. No. 536, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, the available materials do not explicitly demonstrate that Congress intended to exempt nondistributing producers and users from the scope of the amended statute. The legislators simply seem not to have considered such producers and users at all.

This possible lack of consideration falls short of overcoming the plain language of the statute. In the absence of a clear indication that Congress did not mean what it said, we must abide by the terms of the statute as written, which cover Smith's behavior. Smith's assertion that the government must prove that he intended to distribute the visual depictions therefore fails.

B. "Visual Depiction"

Smith also argues that unprocessed, undeveloped film does not constitute a "visual depiction" within the terms of the statute. He argues that substantial, complicated,

and costly developing must be done before any visually perceptible image is created, and that as a result his mailing of the unprocessed film did not violate the child pornography statute.

As a preliminary matter, we note that even if Smith's argument is correct, the lack of an accomplished "visual depiction" would affect only Smith's convictions under section 2252(a) (actual transportation of visual depictions). Section 2251(a) does not require the *actual* production of a visual depiction, merely the enticement of minors "*for the purpose of producing*" a visual depiction of sexually explicit conduct. Whether the film involved here had actually reached the point of "visual depiction" or not, Smith's use of the girls was clearly "for the purpose of producing" such visual depictions. That Smith took the pictures and mailed the undeveloped film for processing and printing is sufficient proof of that purpose to allow a jury to find a violation of section 2251(a).

Turning to the merits of Smith's argument, we note that "visual depiction" is not defined in the statute.[3]

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3. The former definition of "visual depiction" ("any film, photograph, negative, slide, book, magazine, or other visual or print medium") was deleted and not replaced by the 1984 amendments. The government cites legislative history to the effect that the deletion was merely intended to eliminate written (i.e., nonvisual) material from the reach of the statute. Prohibition of such written material raised first amendment questions, see *New York v. Ferber*, 458 U.S. 747, 764-65, 102 S.Ct. 3348, 3358-59, 73 L.Ed.2d 1113 (1982), and was not considered necessary for the protection of the children Congress identified as the victims of the child pornography industry.

In view of our conclusion below based on the broader, affirmative intent of Congress, however, we need not rely on this narrower, "negative" legislative history to characterize undeveloped film as a "visual depiction" within section 2255.

Smith relies on common sense and dictionary definitions for his assertion that unprocessed film is not covered. He correctly notes that color film must undergo an elaborate developing process before any image can be perceived by the human eye.

Nevertheless, we conclude that the exclusion of unprocessed film from the statute's coverage would impede the child pornography laws by protecting a necessary intermediate step in the sexual exploitation of children. The interpretation urged by Smith would allow unrestricted interstate commerce in child pornography so long as the pornography was still in the form of undeveloped film. Such a loophole is inconsistent with congressional intent; the undeveloped state of the film does not eliminate the harm to the child victims in the film's production or the incentive to produce created by the film's trafficking. We therefore hold that undeveloped film constitutes a "visual depiction" as that term is used in 18 U.S.C. § 2252(a).[4]

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4. Although Smith did not specifically raise the issue of due process, we feel that our conclusion here compels us to address the issue.

As a matter of due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939), *quoted in Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). A statute must fail for vagueness if persons "of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), *quoted in Hynes*, 425 U.S. at 620, 96 S.Ct. at 1760. We must

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II. The Search Warrant

At trial, Smith moved to suppress evidence seized at his apartment pursuant to the search warrant on the ground that the postal inspector's affidavit was insufficient to support the issuance of the warrant. The district court denied his motion. We need only ensure "that the magistrate had a substantial basis for concluding that probable cause existed." *United States v. Moreno,* 758 F.2d 425, 427 (9th Cir.1985). The magistrate's decision cannot be reversed unless it is clearly erroneous. *Id.*

Smith argues that the affidavit was an inadequate basis for the warrant, relying primarily on the "anonymous" and "conclusory" allegation that the photos depict "explicit sexual conduct" and the fact that the issuing magistrate never saw the photos.[5] We are troubled by the

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therefore consider whether a statute forbidding the mailing of "visual depictions" of sexually explicit conduct by minors gave Smith fair notice that the mailing of undeveloped film of such activities was thereby prohibited.

We conclude that fair notice was given. The statute clearly forbids the condition precedent of the undeveloped film, the actual inducement of minors into the sexually explicit conduct to be photographed. *See* 18 U.S.C. § 2251. The statute likewise prohibits the mailing of negatives and prints, the logical consequence of mailing undeveloped film to a processor. *See* 18 U.S.C. § 2252. In light of this, we conclude that no person "of common intelligence" would need to "guess" that the intermediate step, the actual mailing of the undeveloped film, was also prohibited. No one fairly reading the statute could reasonably conclude that the statute permitted Smith's acts.

5. Smith also urges that the First Amendment dictates special review of the affidavit because allegedly obscene materials were involved. The government contends that the affidavit

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fact that the government did not present and the magistrate did not see the photos in question before the warrant issued. Obviously, presentation of the photos with the affidavit would have been the ideal course, and the record contains no hint of why this was not done. Nevertheless, we do not find this omission fatal to the warrant in light of the affidavit taken as a whole.

We turn first to the alleged "anonymity" of the affidavit's assertion that the photos depicted "explicit sexual conduct." Although the affidavit is literally susceptible of the construction Smith urges (that the photo company alone asserted that the photos depicted sexually explicit conduct), the common sense reading of the affidavit is that the affiant himself, the postal inspector, represents that the photos are of three juvenile girls engaged

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rested squarely on the child pornography statute, which does not require obscenity. Even if allegedly obscene materials were involved, however, Smith's argument fails. The Supreme Court has recently held that "a warrant authorizing seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally," *United States v. P.J. Video, Inc.*, — U.S. —, 106 S.Ct. 1610, 1615, 89 L.Ed.2d 871 (1986), i.e., "whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 1615-16 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)).

Although the warrant in this case was issued before the decision in *P.J. Video*, we elect to give the Court's holding in *P.J. Video* retroactive effect. We find no salutory effect in limiting a finding that police conduct does *not* violate the constitution. *See United States v. Estrada*, 733 F.2d 683, 685 (9th Cir.) (giving retroactive effect to *Gates*), *cert. denied*, —U.S. —, 105 S.Ct. 168, 194, 83 L.Ed.2d 103 (1984).

in "explicit sexual conduct." The magistrate reasonably and properly relied on this common sense reading of the affidavit. *See United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965).

As to the affidavit's "conclusory" statement that the photographs depicted "sexually explicit conduct," we do not find the character of the allegation fatal to the warrant. Although more specific descriptions of the photographs would have been desirable, we note that the affidavit specifically refers to violation of section 2251, directing the magistrate to the child pornography statute and its definitions. *See* 18 U.S.C. § 2255 (1984 Supp.).[6] These definitions are quite specific, and the magistrate reasonably considered the statement of an experienced

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6. 18 U.S.C. § 2255 (1984 Supp.) is the definitions section of the child pornography statute. It provides in relevant part:

> For the purposes of this chapter, the term—
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> * * * *
>
> (2) "sexually explicit conduct" means actual or simulated—
>
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area or any person[.]

postal inspector that the photos depicted "sexually explicit conduct" within the statute.[7]

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7. We also note that the difference in constitutional requirements between child protection and obscenity statutes also results in different requirements for an affidavit supporting a warrant under the respective statutes. To pass constitutional muster as unprotected obscenity, a work must appeal to the prurient interest in sex when taken as a whole, must portray sexual conduct in a patently offensive way, and must not, taken as a whole, have serious literary, artistic, political, or scientific value. *See Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Although the existence of these characteristics is ultimately a question of fact, submitted to a jury, *see United States v. Cutting*, 538 F.2d 835, 839 (9th Cir. 1976), *cert. denied*, 429 U.S. 1052, 97 S.Ct. 766, 50 L.Ed.2d 769 (1977), a determination of this "fact" involves complicated knowledge and information far beyond that which is evident from the face of a photograph alone. An affidavit that merely alleges that certain photographs are "obscene," therefore, makes a complicated and subjective conclusion unsuitable for an independent judicial evaluation and therefore inadequate for the issuance of a warrant. *See New York v. P.J. Video, Inc.*, — U.S. —, 106 S.Ct. 1610, 1614, 89 L.Ed.2d 871 (1986) (citing *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968)).

In contrast, the constitutional requirements for a child pornography statute are much simpler and more susceptible to credible assertion in an affidavit. For example, "the category of 'sexual conduct' proscribed [by a statute] must . . . be suitably limited and described." *Ferber*, 458 U.S. at 764, 102 S.Ct. at 3358. The conduct addressed by section 2255 is clearly as specific as (indeed, it is almost identical to) the language of the statute approved in *Ferber*. *See Ferber*, 458 U.S. at 765, 102 S.Ct. at 3358 (quoting N.Y. Penal Law § 263.00(3) (McKinney 1980), including "sado-masochistic abuse"). An assertion that certain pictures depict "sexually explicit conduct" prohibited by sections 2251 and 2252 does not require of the affiant extensive knowledge of the prurient interest of the average person, of what portrayals of sexual conduct are patently offensive, or of literary, artistic, political, or scientific criteria for "serious merit." The affiant need only be able to identify the specific, clearly defined acts listed in section 2255.

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Moreover, the affidavit does not stand on the evaluation of the photographs alone. It also reveals a statement by a pediatrician that the girls were under eighteen, Smith's admission that he took the pictures, Smith's declaration that he "would just have to take more" if the pictures were not returned to him, and statements by two of the girls that they had posed for Smith's pictures and that Smith kept a "whip-like" device at his residence.

Taken as a whole, therefore, we conclude that the affidavit provided a substantial basis for a finding of probable cause, and the magistrate's issuance of the warrant was not clearly erroneous.

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This identification is certainly "conclusory" to a certain extent, but it is a conclusion based on observation and not, as in the case of "obscenity," one based on evaluation. The statement that the photographs depict sexually explicit conduct is similar to many other factual conclusions routinely accepted by courts in applications for warrants. For example, the affidavit in the present case also contains the conclusion of a pediatrician that the subjects of the photographs are under the age of eighteen and the conclusion of a postal inspector (not the affiant) that persons who mail photographs like the photographs taken by Smith are often collectors and are likely to have more such materials in their homes. Both of the conclusions are statements of fact based on earlier observations and experience with similar subjects, and Smith does not challenge either as providing an insufficient basis for issuing the warrant. Such experience-based factual conclusions are a normal, necessary, and perfectly acceptable part of an affidavit, *see, e.g., United States v. Hendershot,* 614 F.2d 648, 650 n. 1, 654 (9th Cir.1980) (holding that an affidavit need not detail the experience of the affiant to justify acceptance of the affiant's conclusion "that bank robbers frequently keep clothing, weapons, loot, disguises and other items of evidence in their automobiles."), and do not have the evaluative aspects that raise constitutional problems.

III. Firearms Count

On the basis of the evidence presented at trial, the jury found Smith guilty of one count of being a felon in possession of a firearm. Smith now asserts that there was insufficient evidence to allow a reasonable jury to conclude beyond a reasonable doubt that Smith had constructive possession of the gun, *see United States v. Universal Trade & Industries, Inc.*, 695 F.2d 1151, 1152 (9th Cir.1983) (setting out this standard of review), and that his conviction on this count should therefore be reversed.[8] The government does not dispute that the gun was not registered to Smith, did not bear his fingerprints, and was found inside multiple containers in a closet. Smith concedes the gun was found in his apartment. The sole disputed factual issue is whether Smith knew of the presence of the gun in the closet at the time of the search (that is, *after* his former girlfriend, the gun's owner, moved out). Both parties rightly view this knowledge as crucial to whether Smith had sufficient "dominion and control" over the weapon to allow a jury to find constructive possession. *See, e.g., United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 449 U.S. 1038, 101 S.Ct. 617, 66 L.Ed.2d 500 (1980).

Smith's lack of ownership of the gun and the absence of his fingerprints on it tend to support his claim that he did not know of the gun's presence in his apartment. In addition, as Smith points out, the government

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8. Smith does not dispute that he is a felon or that the gun had travelled in interstate commerce, the other two elements of the offense.

presented no direct evidence at trial that Smith knew of the gun's presence at the time of the search.[9] Neverthe-

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9. The only evidence the government points to as specifically proving Smith's knowledge came in the direct examination of Smith by his own attorney, and that testimony is at best ambiguous. The relevant testimony is as follows, in its entirety:

Q (By Mr. Steward [defense counsel]) Mr. Smith, you have heard testimony about a gun in this case.

A Right.

Q Whose gun is that?

A Well, it was my girl—my last girl friend's gun.

Q What is her name?

A Umeko Ryan.

Q What was it doing in your apartment?

A We lived together four years, and she possessed the gun then.

Q Why didn't she have it now?

A She got married after leaving me to a man that she was working with—both of us were recent divorcees living together, and we were both rebounds, and she rebounded again.

* * *

Q (By Mr. Steward) Why doesn't she have the gun today?

A She got married, and moved out.

Q Did you ever handle that gun?

A No.

Q Did you know you weren't supposed to have a gun?

A No.

Q Now, do you have a felony on your record?

A Yes.

Q When was that?

A 1975.

less, the undisputed presence of the gun in Smith's apartment (an apartment over which he unquestionably had exclusive dominion and control) and his admission that he knew of the gun's earlier presence there suffice to allow a reasonable jury to conclude beyond a reasonable doubt that Smith was in constructive possession of the gun. *Compare Batimana,* 623 F.2d at 1369 (holding that defendants present in hotel room where heroin was delivered were not in constructive possession of the drug because they did not assert dominion and control over the heroin).

IV. Joinder and Severance

A. Joiner Under Rule 8(a)

Smith argues that the firearms count was improperly joined for trial with the child pornography counts and urges us to reverse his convictions and remand the case for a new trial or trials. Misjoinder of charges is an issue of law, reviewable *de novo* by this court. *See United States v. Friedman,* 445 F.2d 1076, 1082 (9th Cir.), *cert. denied,* 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971).

The firearms charge and the child pornography charges are clearly misjoined in the present case. Two offenses may be joined only "if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts on transactions connected together or constituting parts of a common scheme or plan." Fed.R.Crim.P.8(a). The firearms and child pornography counts are clearly dissimilar in kind and, as the government discussed at length in its closing argument, the presence of the gun was in no way related to or part of a common plan involving the photographs of the girls.

Nevertheless, Smith's misjoinder claim must fail because he did not object to joinder at trial. A motion for severance under Rule 14 does not preserve a Rule 8 misjoinder objection for appeal. *See United States v. Scaife,* 749 F.2d 338, 344 (6th Cir.1984); *United States v. Barbosa,* 666 F.2d 704, 707 (1st Cir.1981); *United States v. Hedman,* 630 F.2d 1184, 1200 (7th Cir.1980), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981); *see also United States v. Bailey,* 675 F.2d 1292, 1294 (D.C.Cir.) (holding that a Rule 14 motion for severance preserves a Rule 8 objection to joinder only if it actually raises and argues the basis for the misjoinder finding), *cert. denied,* 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982); *cf.* Fed.R.Crim. P. 12(f). In the present case, Smith moved for severance of the pornography and firearms counts both before and during trial without stating whether he was relying on Rule 8 (Joinder) or Rule 14 (Severance). Smith's counsel's arguments to the court make clear, however, that the motion for severance was based on the prejudice to Smith of exposing the jury, already faced with the emotionally charged issue of child pornography, to the additional taint of Smith's prior felony and his illegal possession of the gun. *See, e.g., United States v. Lewis,* 787 F.2d 1318, 1322-23 (9th Cir.1986). We have canvassed the record presented to us on appeal and can find no argument below addressing the *legal* question of whether Rule 8 permitted the joinder of the disparate charges. We therefore conclude that the Rule 8 issue was not raised below and is therefore waived. *See Bailey,* 675 F.2d at 1294.

B. Severance Under Rule 14

Smith also claims reversible error in the trial court's denial of his motion to sever the firearms and child por-

nography counts. Even if joinder is permissible under Rule 8, a party who feels prejudiced by joinder may move to sever pursuant to Fed.R.Crim.P. 14, which provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

This court reviews the trial court's decision not to sever for abuse of discretion, and there is no abuse of that discretion unless the defendant proves that the joint trial of the charges was "manifestly prejudicial." *Lewis,* 787 F.2d at 1321; *United States v. Kenny,* 645 F.2d 1323, 1345 (9th Cir.), *cert. denied,* 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425, 454 U.S. 828, 102 S.Ct. 121, 70 L.Ed.2d 104 (1981).

Smith asserts specific prejudice mainly from the jury's exposure to the taint of the gun, a .357 Magnum, and Smith's illegal possession of it.[10] Smith argues that evidence of the gun in the same apartment where Smith was allegedly producing the pornography inflamed an already emotionally charged trial and invited the jury to infer that Smith would have used the gun to threaten or

---

10. Smith also asserts prejudice from the revelation to the jury of the prior felony conviction that the firearms charge enabled. As the government points out (and as Smith apparently concedes in his reply brief), however, this prior conviction would have been admissible to impeach Smith anyway. Smith had stated that he would testify and the felony involved dishonesty and was less than ten years old. *See* Fed.R.Evid. 609.

kill the children if they had refused to allow him to take their pictures.

We conclude, however, that the district court's refusal to sever was not manifestly prejudicial. Both the prosecution and the court took great pains to avoid emphasizing the presence of the gun or linking it to the photography. The only government questioning regarding the gun merely located the gun in the apartment. The court carefully cautioned the jury about separating the questions of guilt of the various charges. Finally, the prosecution's own closing argument cautioned the jury not to make inference that Smith claims was prejudicial, that the gun was somehow connected to the photography. Although we have expressed concern about the effectiveness of cautionary instructions in this context, *see Lewis,* 787 F.2d at 1322-23, the circumstances of the present case nevertheless require us to conclude that Smith suffered no manifest prejudice. The presence of the gun would have had the greatest impact, as Smith argues, on the jury's decision on whether Smith had employed, used, persuaded, induced, enticed, or coerced the girls into posing. Smith, however, admitted employing the girls to pose for the pictures, so this element of the crime was not in issue and thus was not subject to prejudice. The main defense offered by Smith at trial and argued by his attorney to the jury was that the photographs depicted merely "horseplay," and not "sexually explicit conduct." We find it difficult to see how the presence of the gun in Smith's apartment could have influenced in any way the jury's decision that the photographs depicted "sexually explicit conduct." We therefore find no manifest prejudice from the failure to sever.

AFFIRMED.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING AND SUGGESTION FOR REHEARING EN BANC.

UNITED STATES OF AMERICA v. JAMES E. SMITH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee, No. 85-1216

v. DC No. 85-01208-01

JAMES E. SMITH, ORDER

Defendant-Appellant.

(Filed October 30, 1986)

Before: CHOY, ALARCON, and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

MEMORANDUM OF DECISION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HON. PAMELA ANN RYMER,

UNITED STATES OF AMERICA v. LELAND ERNEST STEVENSON, JR.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	NO. CR 85-880 PAR
v.	MEMORANDUM
LELAND ERNEST STEVENSON,	OF DECISION
Defendant.	AND ORDER

(Filed December 19, 1985)

This is a motion by defendant to dismiss his three count indictment alleging in count one that he transported child pornography, and in counts two and three that he distributed child pornography which had previously moved in foreign and interstate commerce. Trial was initially set for November 19, 1985, but was continued, pursuant to stipulation, to December 17, 1985. On December 12, defendant filed a motion to dismiss the indictment on the ground that because he transported and distributed *undeveloped* film, he did not violate the statute which prohibits the transportation or distribution of "visual depictions."

The government and defendant have stipulated to the basic facts in this case. On February 4, 1985 an employee

of Yale Laboratories of Hollywood informed the Los Angeles Police Department, Sexually Exploited Child Unit, that an unknown person had left to be processed thirty rolls of Super 8 mm. Ektachrome film depicting children (persons under the age of eighteen) engaged in sexual activity. The contents of the films were discovered by laboratory employees during a routine color check. The film had been deposited in a night drop at Yale Laboratories on January 31, 1985 with a note indicating that the owner would be returning early the next week to pick up the film.

The LAPD detectives went to Yale Laboratories and viewed the 30 films that were left for processing. Each film was 50 feet in length and began by showing a man holding a card with different numbers on each card. Each film depicted sexual activity (sodomy) between male children of East Indian descent, and between the children and male adults. Detectives from the LAPD and FBI agents began a surveillance of the film laboratory to identify the person picking up the film, and to determine where the film was destined. On February 6, 1985 at 10:30 a.m. detectives observed Leland Ernest Stevenson pick up the 30 rolls of film. He placed the items in the trunk of his car and departed.

Stevenson was kept under surveillance during the rest of the day, and was observed to pick up seven packages of developed photographs from a one-hour photo store located in Santa Monica, and place the envelopes in the trunk of his car. Defendant was followed until he reached San Clemente, where he checked into a motel. Detectives approached defendant while he was unloading

his trunk, and took him into custody for possession of child pornography. All photographs and the films were seized.

A subsequent investigation revealed that Mr. Stevenson (46 years old) had recently returned to the United States after visits to Sri Lanka, where he owns property, and India. During his most recent trip, Stevenson had photographs taken of himself engaged in sexual activity with numerous male boys, and at least one girl. Defendant transported the exposed, but as yet undeveloped film from Sri Lanka to his home in Boulder City, Nevada. Subsequently defendant travelled to Los Angeles on or about January 31, 1985, to take the film for processing.

Defendant was indicted on September 11, 1985 in a three count indictment. Count one alleges that defendant transported child pornography from Boulder City, Nevada to Los Angeles, California. Counts two and three allege that defendant distributed child pornography (by dropping the film off at the processing lab), that had previously moved in foreign and interstate commerce. There is no allegation that defendant is a commercial photographer or engaged in the commercial distribution of child pornography.

Defendant argues that the transportation and distribution of undeveloped film containing depictions of minors engaged in sexually explicit conduct is not prohibited by 18 U.S.C. § 2251 which provides that a person who transports or ships, receives or distributes any *visual depiction* of children engaged in explicit sexual activity that has been transported in interstate commerce shall be punished. Defendant would read the phrase "visual depiction" to exclude from punishment all transportation

and distribution of film that has not undergone the chemical process necessary for the images to be seen by the naked eye.

Defendant argues that because the language of criminal statutes is to be construed narrowly, see *Dowling v. United States,* 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985), and the language should be given its ordinary meaning, see *Perrin v. United States,* 444 U.S. 37, 42 (1979), the term "visual depiction" must be interpreted as only including those depictions already transformed into images visible by the naked eye, and thus his conduct is not prohibited by the statute. The *Random House Dictionary of the English Language* (unabridged 1975) defines "visual" as "of or pertaining to seeing or sight." The word "visual" encompasses those things that relate to or have an association to sight. As the creation of visible images by the process of photography *necessarily* involves *both:* 1) the exposure of the image onto film; and 2) processing of the film to create an image visible to the naked eye, both steps pertain or relate to "sight", in that they are integral to the creation of a visible image and thus are encompassed by the term visual. To separate out the two steps and argue that one step relates to sight and is "visual," because it happens to be the end result of an interrelated process, while the other step does not, is artificially to avoid the real meaning of the term. Thus, the cases defendant cites for the proposition that a criminal statute may not be interpreted to reach beyond the common meaning of the language are inapposite. Defendant cannot dispute that the exposure of images onto film *necessarily* encompasses an intent to develop those pictures. *Cf. Spillman v. United States,* 413 F.2d 527 (9th Cir. 1969)

(Statute proscribing the mailing of obscene "matter" held to include the mailing of undeveloped film). As defendant's conduct here demonstrates, the purpose of taking the pictures and transporting the film was to create a visible image; to argue that the transporting of undeveloped film containing child pornography should not be punished because a defendant may choose not to develop the film is nonsensical, and clearly contrary to Congressional intent.

As stated in *Dowling,* "When assessing the reach of a federal criminal statute, we must play close heed to language, legislative history, and purpose in order strictly to determine the scope of conduct the enactment forbids." *Id.* at 158. An examination of the legislative history and case law indicates that the intent of Congress was to criminalize the creation, transportation, and distribution of all film in the child pornography production chain, regardless of whether it had already been fully processed or simply exposed, but undeveloped. The language of a statute must be read, where possible, consistent with its legislative intent. *Commissioner v. Brown,* 380 U.S. 563 (1965). Prior to the 1984 amendments § 2251 utilized the term "visual and print medium," as opposed to "visual depiction." A medium is "an agency, means or instrument." *Random House Dictionary of the English Language.* Exposed, but undeveloped film is a medium for the creation of visual images, and thus clearly covered by the language of the prior act.

However, the former law included both visual and *print* media. The Supreme Court indicated in *New York v. Ferber,* 458 U.S. 747 (1982) that a statute could con-

stitutionally prohibit all visual depictions of child pornography, without having to meet the *Miller* test for obscenity, but that written or simulated depictions of sexual conduct, not otherwise obscene, retained First Amendment Protection. The legislative history of the 1984 amendments indicates that the language change was in response to *Ferber,* and was a technical amendment to "clarify the application of the section to the production of a 'visual depiction' of a minor engaged in sexually explicit conduct." It eliminates coverage of print medium in order to comport with elimination of the obscenity element of the offense." H.R. Rep. No. 536, 98th Cong., 1st session pp. 6-7, 8 ("Report"). It is clear that the section applies to the production of visual depictions, and the change in language was merely designed to eliminate the print medium, not change the treatment of the visual medium.

Further, as stated in *United States v. Langford,* 688 F.2d 1088 (7th Cir. 1982), *cert. denied,* 461 U.S. 959 (1983), "Our review of the legislative history of the pornography statutes shows that Congress was concerned with the overall chain of commercial pornography, from the taking of the obscene pictures, the processing of the prints, to the ultimate sale of the obscene prints and that Congress clearly intended that § 2251 *et seq.* eradicate the entire commercial chain involved in the production, distribution and sale of child pornography." Defendant contends that the statute should not be read as broadly in this case, because it is unclear that Congress intended to punish the importation and transportation of undeveloped film where defendant had no intent to disseminate the developed material, commercially or non-commercially, and the photographs were taken abroad. The legislative history effec-

tively rebuts that argument, as the 1984 amendments eliminated the commercial purpose requirement. As the report indicates, "[s]ince the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement." Report, pp. 2-3. The harm to the protected group (children) exists whether or not the activities have a commerical purpose. Nor is there any indication that Congress intended to exempt from coverage visual depictions of child pornography created overseas. The eradication of child pornography and its resultant evils would hardly be served by allowing a flourishing industry based on the exploitation of children overseas. Besides the obvious harm to children of foreign nations, allowing the child pornography industry to flourish would unquestionably increase the potential harm to all children, and contravene legislative intent.

Further, the effect of interpreting the statute the way defendant wishes would be to render the statute virtually ineffectual. A person seeking to avoid punishment for the transportation or distribution of child pornography would only need take the simple precaution of not developing the film prior to its reaching the end person in the distrbution scheme. This would emasculate Section 2251, which prohibits the sexual exploitation of children, as well as Section 2252, because the exploiters of children could not be prosecuted if they could prove they never intended any "visual depictions" to be transported interstate, only undeveloped film. This reading would thwart an obvious and important purpose of the statute—to protect children, and cannot be accepted. *Brown,* 380 U.S. at 571.

Defendant cites *United States v. Petrov,* 747 F.2d 824 (2nd Cir. 1984) to support the contention that the statute should not be given a broad construction. *Petrov* involved a pre-1984 prosecution of a film processor under § 2251, which proscribes inducing a minor to engage in child pornography. The court indicated that although the statutory language was broadly worded, Congress had specifically declined to amend the Act to include persons who processed or duplicated film, and thus § 2251 could not be construed to punish a film processor. *Petrov* did not involve the issue presented in this case, and here both the language and the legislative history support the conclusion that Congress intended to punish defendant's conduct.

Defendant argues alternatively that he relied on the "plain language" of the 1984 Act, and therefore had no idea his activities violated the Act. As a result, defendant had no fair notice of the Act's reach, and thus prosecution under the statute amounts to a violation of due process. To pass muster under the due process clause a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Because child pornography is unprotected by the first amendment, the constitutional challenge of vagueness must be based on the statute's application to the particular case. *Balthazar v. Superior Court of Comm. of Mass.,* 573 F.2d 698 (1st Cir. 1978). Further it must be recognized that "few words possess the precision of mathematical symbols, . . . nor is it unfair to require that one who deliberately goes perilously close to an area

of proscribed conduct shall take the risk that he may cross that line." *Boyce Motor Lines v. United States,* 342 U.S. 337, 340 (1952).

The facts show that (1) defendant engaged in sex with children under the age of 18; (2) he recorded those activities on motion picture film and still photographs; (3) he travelled across state lines to get the film developed using an alias; (4) he intended to return to Nevada with the developed film. It is also clear that: (1) sex with minors is a crime; (2) photographing sex with minors is a crime; (3) transporting child pornography is a crime; (4) undeveloped film is encompassed by the obscenity statutes, see *Spillman v. United States;* and (5) negatives have been held to be encompassed by § 2252, see *United States v. Langford.* It is in this context that defendant's argument that he was under no fair notice that his conduct in transporting and distributing the undeveloped film was illegal must be viewed. At the very least defendant is one who "deliberately [went] perilously close to an area of proscribed conduct" and assumed the risk that he might cross the line. *Boyce Motor Co.,* at 340; *United States v. Wise,* 550 F.2d at 1186.

Further, the plain language of the statute and a common sense interpretation of it suggests that transportation and distribution of film, whether developed or undeveloped, of a minor engaged in sexually explicit conduct is illegal. Finally for the purposes of fair notice, it is important to note that the pre-1984 statute applied to all film, and there is no indication in the legislative history that Congress intended to change the reach of the statute as it involved visual depictions. To the contrary, the

thrust of the 1984 amendments and adoption of the Child Protection Act of 1984 was to expand coverage of the laws against child pornography. *See,* Report, p.11.

Accordingly, defendants motion to dismiss his indictment is DENIED.

DATE: December 17, 1985.

/s/ Pamela Ann Rymer
United States District Judge

APPENDIX D

MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AFFIRMING JUDGMENT OF DISTRICT COURT,

UNITED STATES OF AMERICA v. LELAND ERNEST STEVENSON, JR.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 86-5102
Plaintiff-Appellee,	D.C. No.
v.	CR-85-880-PAR-1
LELAND ERNEST STEVENSON, JR.,	
Defendant-Appellant.	MEMORANDUM*

(Filed December 10, 1986)

Appeal from the United States District Court
for the Central District of California

Pamela A. Rymer, District Judge, Presiding

Argued and Submitted November 3, 1986—
Pasadena, California

Before: BROWNING, Chief Judge, GOODWIN and FARRIS, Circuit Judges

Appellant was convicted of violating the Child Protection Act of 1984, 18 U.S.C. § 2252. We affirm.

All of the issues appellant raises have been decided against his position in *United States v. Smith*, 795 F.2d

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

841 (9th Cir. 1986), in which we held section 2252 includes exposed, but undeveloped film in the term "visual depiction," *id.* at 846-47; the statute provides fair notice of its provisions, *id.* at 847 n.4; and intent to distribute the visual depictions is not necessary for a violation of the statute, *id.* at 846.

The judgment of the district court is AFFIRMED.

No. 86-1257

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. SMITH AND LELAND E. STEVENSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the version of 18 U.S.C. (Supp. II) 2252(a) that applied between 1984 and 1986, which proscribed the interstate transportation or mailing of "any visual depiction" of minors engaged in sexually explicit conduct, prohibited the transportation or mailing of undeveloped film.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1257

JAMES E. SMITH AND LELAND E. STEVENSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner Smith's conviction (Pet. App. 1-18) is reported at 795 F.2d 841. The order of the court of appeals affirming petitioner Stevenson's conviction (Pet. App. 30-31) is unreported. The opinion of the district court denying the motion to dismiss Stevenson's indictment (Pet. App. 20-29) is also unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner Smith's convictions was entered on July 29, 1986. A petition for rehearing was denied on October 30, 1986 (Pet. App. 19). Smith's petition for a writ of certiorari was therefore due, under Rule 20.1 of the Rules of this Court, on December 29, 1986. The petition was filed as of January 2, 1987, without a notarized statement of a member of the bar

of this Court as described in Rule 28.2 of the Rules of this Court. It is therefore out of time. The judgment of the court of appeals affirming petitioner Stevenson's conviction was entered on December 10, 1986. Accordingly, with respect to Stevenson, the petition for a writ of certiorari was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Hawaii, petitioner Smith was convicted on three counts of coercing minors to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, knowing that such visual depictions would be transported in interstate commerce and mailed, in violation of 18 U.S.C. (Supp. II) 2251(a). He was also convicted on three counts of mailing those visual depictions, in violation of 18 U.S.C. (Supp. II) 2252(a)(1), and one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to ten years' imprisonment on one of the Section 2251 counts, to be followed by a five-year probationary term imposed on the remaining counts. He was also assessed $50 on each count pursuant to 18 U.S.C. (Supp. II) 3013.

The evidence at trial showed that in 1984 Smith photographed three girls, aged 13 and 14, in various stages of nudity. He mailed the undeveloped film from Hawaii to a photo company in Maryland for development. After developing the film, the company contacted United States Postal Service inspectors, who consulted a pediatrician to confirm that the girls were under the age of 18. Pet. App. 2.

The court of appeals affirmed Smith's convictions on all counts (Pet. App. 1-18). With respect to the three counts charging the mailing of visual depictions of minors engaging in sexually explicit conduct, the court held that the term

"visual depiction" as used in the statute encompasses undeveloped film. Pet. App. 5-7. The court noted that the 1984 version of the statute did not define "visual depiction." The court held, however, that it would be inconsistent with Congress's intent to construe "visual depiction" to exclude undeveloped film, since "the undeveloped state of the film does not eliminate the harm to the child victims in the film's production or the incentive to produce created by the film's trafficking" (*id.* at 7).

The court also concluded that the statute was not unconstitutionally vague. Pet. App. 7-8 n.4. The court observed that Section 2251 plainly forbids "the condition precedent of the undeveloped film, the actual inducement of minors into the sexually explicit conduct to be photographed" (Pet. App. 8 n.4). And Section 2252 unquestionably prohibits "the mailing of negatives and prints, the logical consequence of mailing undeveloped film to a processor" (Pet. App. 8 n.4). Accordingly, the court reasoned, "no person 'of common intelligence' would need to 'guess' that the intermediate step, the actual mailing of the undeveloped film, was also prohibited" (*ibid.*).

2. Petitioner Stevenson entered a conditional guilty plea in the United States District Court for the Central District of California on one count charging him with the interstate transportation of 30 rolls of undeveloped eight-millimeter film and five rolls of undeveloped Kodak film depicting minor children engaged in sexually explicit conduct, in violation of 18 U.S.C. (Supp. II) 2252(a)(1). He was sentenced to five years' imprisonment, and he was assessed $50 pursuant to 18 U.S.C. (Supp. II) 3013.

A stipulation of facts between Stevenson and the government stated that the films in question depicted sexual activity between Stevenson and young boys of East Asian descent. The photographs and films had been taken on Stevenson's recent trip to Sri Lanka and India, and he had

transported the undeveloped film back to his home in Nevada. In January 1985 he drove the rolls of film to Hollywood, California, where he dropped them off at a laboratory for processing. When the laboratory developed the film and discovered the subject matter, it contacted the Los Angeles Police Department. Stevenson was arrested after he picked up the developed movies and photographs from the laboratory. Pet. App. 21-22.

Stevenson moved to dismiss the indictment on the ground that the statute did not prohibit the transportation of undeveloped film. The district court denied the motion to dismiss (Pet. App. 20-29). The court held that the term "visual depiction" encompasses undeveloped film. The court reasoned that Stevenson exposed images onto the film with the intent to develop the film, and that the process therefore fit within the dictionary definition of "visual," which is "of or pertaining to seeing or sight" (*id.* at 23).

The district court also found that the legislative history of Section 2252 showed that Congress intended to punish the interstate transportation of undeveloped film. Prior to 1984, the statutory scheme used the phrase "visual or print medium" rather than "visual depiction." The court observed that "[e]xposed, but undeveloped film is a medium for the creation of visual images, and thus clearly covered by the language of the prior act" (Pet. App. 24). Congress amended the Act in 1984 and, the court observed, "the thrust of the 1984 amendments * * * was to expand coverage of the laws against child pornography" (*id.* at 28-29). Accordingly, the court concluded, if the former version of the statute encompassed undeveloped film, then Congress must have intended to cover undeveloped film in the 1984 version of the statute (*id.* at 24-26).

The district court rejected Stevenson's argument that the statute did not give him fair notice that his conduct was criminal. The court observed that Stevenson had engaged in

sex with children under the age of 18; he had recorded those activities on film; he had traveled across state lines to develop the film using an alias; and he had intended to return to Nevada with the developed film. Pet. App. 28. The court further noted that sex with minors is a crime; photographing sex with minors is a crime; transporting child pornography is a crime; the obscenity statutes apply to undeveloped film; and negatives are within the ambit of Section 2252 (Pet. App. 28). Therefore, at the very least, Stevenson " 'deliberately [went] perilously close to an area of proscribed conduct' and assumed the risk that he might cross the line" (*ibid.*, quoting *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952)).

The court of appeals affirmed Stevenson's conviction on the basis of its prior decision affirming Smith's conviction (Pet. App. 30-31).

ARGUMENT

Petitioners first suggest that exposed but undeveloped film is not a "visual depiction" as that term was used in the 1984 version of Section 2252(a)(1). They contend that "[t]here are very good reasons" to conclude that Congress did not intend the 1984 version of Section 2252 "to apply to exposed but undeveloped film" (Pet. 10). After making their argument to that effect, however, petitioners state that they do not challenge "the questionable holding of the Court of Appeals that, although the 1984 Congress used plain language indicating otherwise, it nonetheless intended to include undeveloped film in the coverage of Section 2252" (Pet. 22). Instead, they argue that, prior to 1986, Congress failed to state its intention to cover undeveloped film with sufficient clarity, and that their convictions therefore offend due process.

Petitioners are wrong. Both the language of the statute and its legislative history demonstrate that the 1984 version of Section 2252 prohibited the transportation of undeveloped film that recorded minors engaging in sexually

explicit conduct, and petitioners were given fair notice that transporting such film was prohibited. Petitioners cite no court decision holding that undeveloped film was not a visual depiction under the 1984 version of Section 2252. Moreover, in 1986 Congress defined "visual depiction" expressly to include "undeveloped film." Pub. L. No. 99-628, § 4, 100 Stat. 3511 (to be codified at 18 U.S.C. 2255(5)). The question whether undeveloped film is a visual depiction therefore will not arise in the future. Accordingly, review is not warranted.

1. The 1984 version of Section 2252(a)(1) proscribed the interstate mailing or transportation of any "visual depiction" if

> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct * * *.

Between 1984, when the term "visual depiction" was added to the statute, and 1986, when the term was specifically defined to include videotapes and undeveloped film, the statute did not contain a definition of "visual depiction." It was clear, however, that exposed but undeveloped film fell within the intended reach of that term. A camera imprints what it captures onto undeveloped film and the image is stored on the undeveloped film until it is reproduced onto a negative, print, slide, or movie film. Whether or not one can see the image while it is stored on the exposed film, the film still contains the image. Thus, exposed but undeveloped film contains "visual depictions" of that which was seen through the camera lens and recorded.[1]

[1]Many forms of developed film, such as microfilm, videotape, and eight-millimeter movie film, are not visible to the naked eye without some form of mechanical, electronic, or optical enhancement. We see no principled basis for distinguishing between developed film that needs to be "processed" through a magnifying projector or a television receiver before it is visible to the naked eye and undeveloped film that needs to be processed chemically before it becomes visible.

As originally enacted in 1978, Section 2252(a)(2) proscribed the interstate transportation or shipment of any "obscene visual or print medium" that was produced by the use of a minor engaging in sexually explicit conduct. Pub. L. No. 95-225, § 2(a), 92 Stat. 8. Section 2253(4) defined "visual or print medium" as "any film, photograph, negative, slide, book, magazine, or other visual or print medium" (Pub. L. No. 95-225, § 2(a), 92 Stat. 8). Plainly, film is a "medium" for producing visual images and "any film" necessarily includes undeveloped film. Consequently, the 1978 statute prohibited the interstate transportation of undeveloped film containing obscene images of children.

In 1982, this Court held that works that visually depict sexual conduct by children are not protected by the First Amendment, even if they are not obscene. *New York* v. *Ferber*, 458 U.S. 747, 764. In response to *Ferber*, Congress amended the federal child pornography statute in 1984 to broaden its coverage by deleting the obscenity requirement. Because written materials retain First Amendment protection, however, Congress further amended the statute to exclude "print medium" from the Act's coverage and replaced the phrase "obscene visual or print medium" with the term "visual depiction." Pub. L. No. 98-292, § 6, 98 Stat. 206; H.R. Rep. 98-536, 98th Cong., 1st Sess. 2-3 (1983). While the amended statute did not define "visual depiction," nothing in the legislative history to the 1984 amendment evidenced an intent by Congress to eliminate any of the types of visual media that were specifically covered in the 1978 version of the Act.

The 1986 amendment to the statute made it clear that Congress did not intend to restrict the types of visual media covered by the statute. In that year, in a clarifying amendment to the Act, Congress defined "visual depiction" as specifically including "undeveloped film and videotape." Pub. L. No. 99-628, § 4, 100 Stat. 3511 (to be codified at 18 U.S.C. 2255(5)). The House Report explained the reason for the amendment (H. R. Rep. 99-910, 99th Cong., 2d Sess. 7 (1986)):

> In the 1984 amendments, the defined term "visual or print medium" (which term was replaced in the offenses by the term "visual depiction") was dropped as a defined term since it was felt that a definition was no longer necessary. The bill defines the term "visual depiction" to include express coverage of undeveloped film and videotape to facilitate prosecutions involving such media, at the recommendation of the U.S. Postal Inspection Service. The Committee intends that any visual depiction of sexually explicit conduct that can be retrieved by electromagnetic, chemical or other means shall also be included in the terms "visual depiction." The Committee approves of the holding of the U.S. Court of Appeals for the Ninth Circuit in rejecting the argument that the term "visual depiction" does not include undeveloped film [citing the decision below in petitioner Smith's appeal].

Thus, the purpose of the 1986 amendment was not to broaden or alter the definition of "visual depiction" as that term was used in the 1984 version of the statute. Rather, the 1986 amendment of the Act simply clarified Congress's intent that the term "visual depiction" had always encompassed undeveloped film. The background of the 1986 amendment therefore supports the conclusion that the interstate transportation or mailing of undeveloped film was prohibited in 1984.

2. Contrary to petitioners' contention, the 1984 version of the statute did not fail to apprise them that the transportation of undeveloped film containing images of children engaging in sexually explicit conduct was prohibited. A penal statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); accord, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Here, when the entire statutory scheme is examined, there can be little doubt that

Congress did not intend to exempt persons who mail or transport undeveloped film to a photo laboratory for development.

The purpose of the statute was and is the protection of children. As amended in 1984, the statute prohibited producing, mailing, transporting, distributing, and receiving child pornography. Section 2251 prohibited anyone from inducing a minor to engage in sexually explicit conduct for the purpose of "producing any visual depiction of such conduct." Section 2252 prohibited the interstate transportation or mailing of such visual depictions. Petitioners do not dispute that between 1984 and 1986 Section 2252 applied broadly to all forms of visual images, such as negatives, prints, slides, or developed movies. There was nothing in the statute or its legislative history that could have led anyone of reasonable intelligence to believe that Congress meant to exempt from criminal liability the mailing or transporting of undeveloped film to a photo processor for developing. Film, whether developed or undeveloped, is plainly a "visual medium," within the meaning of the term used in the 1978 statute. The use of the term "visual depiction" in the 1984 version of the statute was not accompanied by an indication, express or implied, that Congress meant to narrow the reach of the statute with respect to visual images. And the 1984 statute could not reasonably be construed to be applicable only to visual images in a form that could be easily viewed by the naked eye without any need for processing or enhancement. That construction would have omitted videotapes and movie film, which were plainly within the intended reach of the statute. Undeveloped film, which contains visual images that can be made visible to the naked eye after chemical processing therefore falls within the natural construction of the term "visual depiction." Accordingly, it did not violate due process to apply Section 2252 to petitioners' conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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